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Court : Karnataka

Decided On : Jul-19-1991

Reported in : AIR1992Kant282; ILR1992KAR3007; 1991(4)KarLJ119

Judge : R. Ramakrishna, J.

Acts : Evidence Act, 1872 - Sections 68 and 90; Code of Civil Procedure (CPC), 1908 - Sections 96 - Order 41, Rule 31

Appeal No. : R.S.A. No. 325 of 1981

Appellant : Kempamma

Respondent : Kalamma and Others

Advocate for Def. : S.V. Raghavanchar, ;S.V. Narsaimhan and ;K.S. Ramaswamy Iyengar, Advs.

Advocate for Pet/Ap. : Mr. S. Ananth, Adv.

Judgement :

1. This Appeal is directed against the Judgment and Decree in R.A. No. 20 of 1979 dated 18-12-1980 on the file of the Civil Judge, Tiptur.

2. The appellant was the plaintiff in O.S. No. 190 of 1973 on the file of the Addl. Munsif, J MFC, Tiptur. She has filed the said suit for declaration of title and possession against six defendants in respect of Items 1 to 3 consisted of

agricultural lands and Item No. 4 a house bearing Kaneshmari No. 29.

3. The case made out by the appellant, in brief, are as follows :

That the Suit schedule properties belong to her father Chinnegowda who has executed a registeredd Will In her favour on 6-4-1925. After the death of Chinnegowda, she has become the owner and paying the land revenue to the properties. The 5th defendant Honnegowda who is her son was managing the suit schedule properties on her behalf in a fiduciary capacity and his name has been entered in the Revenue Records.

4. The first respondent filed an Original Suit in No. 176 of 1962 against the 5th defendant Honnegowda for maintenance and she was succeeded in that suit at the stage of Appeal in R.A. No. 165 of 1966. She is the wife of the 5th defendant. Likewise, respondents 2 to 4 are defendants 2 to 4 before the trial Court have also filed another maintenance Suit against Honnegowda which was decreed. In connection with O.S. No. 176 of 1962, an Execution Petition was filed and the Suit schedule properties were attached an auction was fixed to be held on 27-6-1973. The appellant having come to know of it, filed O.S. No. 190 of 1973 contending that the decrees obtained by the first respondent and respondents 2 to 4 are collusive one and obtained by fraud. She has further contended that she and defendant no. 6 one Shivanna brother of defendant No. 5 were not parties to the Maintenance Suits. She has contended that the schedule properties belong to her and respondents 1 to 4 have no right to proceed against those properties. Likewise, the decrees in O.S. No. 176 of 1962 and O.S. No. 652 of 1965 were not binding on the appellant. It is further averred that, respondents 1 to 4 have falsely created a partition regarding the suit items 1 to 4 in order to get decrees.

5. The defendants 5 and 6 who were not made parties before the first appellate Court and also in this appeal, were remained absent before the trial Court. Subsequently, they are placed ex parte and the suit was dismissed against them and also against defendant No. 4 who is the 4lh respondent in this appeal. Respondents 1 to 3 have contested the suit and denied the execution of the will in favour of the appellant on 6-4-1925 by her father. They have also denied the fact that she was in possession of the said properties and the 5th defendant was only

managing those properties. It is contended that the suit schedule properties were joint family properties where defendants 5 and 6 have got partitioned those properties during the lifetime of their father and thereafter, they were in exclusive possession of their respective shares. The appellant also got a share and she was enjoying exclusively along with her husband in respect of her share of the properties. Item No. I of the said property is the self-acquired property of defendant No. 5 and he had shares in the properties at Items 2 and 3. They have further contended that the appellant in collusion with defendant No. 5 in order to defraud respondents 1 to 4 from executing the maintenance decree, have filed a suit for declaration and possession. They have contended that the appellant had the knowledge of the above suit sand decrees and she has also acquiesced. Therefore, she is estopped from bringing the present suit.

6. The trial Court has framed the following issues for determination and gave its findings as follows :

'(1) Docs plaintiff prove that the suit schedule properties belonging to her father Chinnego wda and that by virtue of a registered Will dt. 6-4-1925 executed by the said Chinnegowda and after his death, whether the plaintiff become the absolute owner in possession of the suit schedule properties?

(2) Does plaintiff prove that 5th defendant is residing with her and was assisting the plaintiff in the management of the suit schedule properties for and on behalf of the plaintiff?

(3) Whether the defendants 1 to 3 prove that the suit schedule properties were the joint family properties of the 5th and 6th defendant and during the lifetime of their father those joint family properties were divided as mentioned in para 3 of the written statement and those properties were divided between their father and themselves and each sharer was enjoying his properties separately on their own right and whether the plaintiff and her husband were thus enjoying their properties separately in their own right and whether the plaintiffs suit is maintainable in this count?

(4) Whether the items 1 to 3 of the suit schedule properties are self-acquired properties of defendant No. 5?

(5) Whether the proceedings instituted by defendants 1 to 4 in O.S. 176/62 and O.S. 652/65 are collusive proceedings as alleged and are not binding on the plaintiffs?

(6) Whether the plaintiff has agreed for division of the suit schedule properties and has waived her right in respect of these properties as alleged in para 6 of the written statement?

(7) Whether the plaintiff is entitled to a permanent injunction?

(8) Whether the plaintiff's suit is barred by principles of estoppel in view of the reasons of para 11 of the written statement?

(9) To what reliefs are the parties entitled to?

(10) To what order?

Findings :

Issue No. 1 : Yes -- in respect of suit items 1 to 3

No. -- in respect of No. 4.

Issue No. 2 : No.

Issue No. 3 : No. Issue No. 4 : No.

Issue No. 5 : No.

Issue No. 6 : No.

Issue No. 7 : Yes.

Issue No. 8 : No.

Issue No. 9 : Declaration of title.

Issue No. 10 : As per order.'

The trial Court decreed the suit in regard to suit schedule Items 1 to 3 and dismissed regarding the suit schedule Item No. 4. The appellant has been declared as the owner of the suit schedule Items 1 to 3 and respondents are restrained from interfering with her peacefulpossession in respect of Items 1 to 3.

7. Being aggrieved by the Judgment and Decree, respondents 1 to 4 have filed an Appeal in R. A. No. 20/79 in the Court of the Civil Judge, Tiptur. The first appellate Court framed only one point for consideration, i.e.,

'Whether the Judgment and decree of the lower Court is sustainable in law?'

The appellate Court answered the said point in the negative and allowed the Appeal by setting aside the Judgment of the trial Court

8. At the time of admission, this Court has formulated the following substantial questions of law which requires determination in this Appeal :

'(1) Is the lower appellate court right in law in concluding that the registeredd Will Ex.P.1 (original) is not proved, by misapplying the provisions in Section 90 of the Evidence Act and ignoring the decision in AIR 1947 PC 15 (Munnalal v. Mst. Kashibai)?

(2) Are the Judgment and decree passed by the lower appellate Court vitiated on the ground that it has failed to raise points for consideration as arising out of Issues Nos. 3 to 6?'

9. Before considering the merits of the appeal, the relationship between the parties and the background for filing this Suit should be noted. These facts are borne out through the pleadings and evidence of the parties.

10. Plaintiff is the mother-in-law of first Respondent and grandmother of respondents 2 to 4. defendant No. 5 Honnegowda is the husband of I Respondent and father of Respondents 2 to 4. I Respondent filed a Suit for maintenance against her husband in O.S No. 176 of 1972, and succeeded in the Appeal stage in R.A No. 165 of 1966. The decree obtained in that suit is the subject matter of

Execution where the suit schedule properties which were in the name of Honnegowda were attached and subject matter of sale. Similarly, Respondents 3 to 4, the daughters of Honnegowda also filed a suit for maintenance in O.S. No. 652 of 1965 and the said suit was decreed. When by virtue of Execution case the suit schedule properties attached and the sale was fixed on 27-5-1973, the appellant filed the present Suit on 13-6-1973 and sought for declaration and permanent injunction in respect of suit schedule properties which arc subject matter of attachment for maintenance decree after they were proved to be in the ownership of Honnegowda. This fact of ownership was proved in the evidence of first respondent and also by virtue of documents, which however, is not the main issue now.

11. The appellant by virtue of Ex.P.1, an alleged Registered Will, dated 13-4-1925, sought the assistance of the Court to declare that she is the rightful owner to the suit schedule properties and further to declare that the schedule properties are free from charge by virtue of maintenance decrees in O.S. 176/82 and O.S. 652/65 for which reference is already made at supra.

12. Admittedly, 13 items of properties are shown in Ex.P.1. The appellant sought for declaration only in respect of 3 properties which are also in full extent as shown in Ex.P.1, For e.g., Item No. 1 of the property is shown as S.No. 33/2 -- garden land measuring O.16 guntas assessed to Rs. 1.50 and bounded by East Garden land of Honnay-yanna, West by : Land of Puttabasavaiah, South by : Gudi Gowda Nanjappa's land and North by : Siddappa's Garden land. This corresponds to item No. 2 in Ex.P.1. The description of the property here is that, Sy. No. 33 measures 0.31 guntas, assessed at Rs. 3/-. Boundaries are not so much relevant as there will be change due to several factors like sale, inheritance etc., This discrepancy applies to item Nos. 2 and 3 also.

13. The above facts abundantly make it clear that the intention of the appellant is to ask for a declaration by relying on Ex.P. 1. We have no material whether Ex.P.1. was acted upon after the death of her father. The year of death of testator is also not clear as there is inconsistency in the oral evidence of appellant and first respondent.

14. The evidence of first respondent shows that the father of the appellant died just 20 years before the Suit and there was partition of the entire properties between the appellant and her son. She also contended that first item of the property is the self-acquired property of her husband Honnegowda. If it is so, Ex.P.1 was not acted upon.

15. The above facts are only a prelude to the case of the appellant. In this background, Ex.P.1 is to be examined.

16. Sri S. Ananth, learned Counsel appearing for the appellant, submitted that, the first appellate Court has committed an error in holding that Ex.P.1 has not been proved and requires to he proved in accordance with Section 68 of the Evidence Act, when admittedly, the documents more than 30 years old and the Executor, Attestor and the Scribe are not living. The learned Counsel placed his reliance to a decision of this Court in Sri Sidharood Swamy Math Trust Committee v. Mallappa reported in : ILR 1985 KAR1440 . In this decision, one Balavva, as an owner having inherited the suit properties from her mother, executed a registered Will in the year 1919 bequeathing them in favour of plaintiff No. 1. The testator died issueless. After her death, plaintiff No. 1 took over possession of the suit lands. The defendants questioned the authority of Balavva to execute a Will as they contended that the suit land was ancestral property of defendants. They have also contended that the Will under which the plaintiff claiming title is not genuine. In that background, the trial Court taking the aid of Section 90 of the Indian Evidence Act, held that the Execution and attestation of the Will are proved by the principles of presumption available under Section 90 of the Evidence Act. Reliance placed to the Privy Council decision in Munnalal v. Kashibai AIR 1947 PC 15. The first appellate Court reversed this finding on the ground that one of the attestations Rangarao is being alive, the Will is to be proved in accordance with Section 68 of the Evidence Act. The learned Judge held :

'It has been held that in view of the terms and provisions of Section 90 of the Indian Evidence Act, execution and attestation of the Will have to be presumed and this presumption will also include the presumptionthat the executor was in sound disposing state of mind.... Section 90 of the Indian Evidence Act does not

refer to examination of witnesses. It lays down that when a document is an ancient document, being 30 years old, presumption arises as provided therein. Therefore it has to be held that whether the witnesses to the document are alive are dead, statutory presumption does arise ..... the presumption is not affected by the proof that the witnesses are living. If witnesses are available, their evidence may he useful in rebutting the presumption that statutorily arises because the presumption under Section 90 is necessarily in law a rebuttable presumption.'

17. Section 90 of the Indian Evidence Act reads as follows :

'Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.'

18. In this case, the appellant sought to establish her ownership by virtue of the Will Ex.P.1. It is no doubt that the Will was more than 30 years old and the presumption available under Section 90 of the Evidence Act can very well be extended to Ex.P.1. But unfortunately, the appellant excepting propounding the existence of a Will dated 13-4-1925, has not made any averments in her pleadings that the Will was acted upon after the death of the father as the bequeath is in respect of 13 items of properties. He was in sound disposition of mind at the time of execution; It was duly attested and it was the last Will and testament of the testator.

18A. These are the basic and fundamental requirements to be averred by the propounder of a Will after a long lapse of time. The propounder should also be made clear as to how he/she has gained the knowledge of the Will, when and how. These requirements are not a mere formality.

19. In the absence of the above averments, the presumptions available under Section 90 of the Evidence Act cannot be extended to a Will even if it is a registered Will. There is no acceptable evidence when actually, the testator died

after execution of the Will. Further the trial Court has not made any efforts to examine the genuineness of the Will and it also not applied the presumption available under Section 90 of the Act. The Records disclose that the learned Munsiff accepted the genuineness of the Will as it has come from the custody of the appellant and it is executed in the year 1924. The appellant has attempted to establish her right over the suit schedule property without proving the Will when the first Respondent disputed the existence of the Will in para 2 of the Written Statement.

20. The first appellate Court after examining Ex.P.4. R. R. Extracts pertaining to hem No. 1 of the Suit schedule property, Ex.P.5 pahani extract and Ex.P.6 Land Revenue Receipt Patta Book, where the suit schedule properties I to 3 found to be in the name of Honnegowda, proceeded to examine Ex.P.1. The first appellate Court proceeded to observe that though presumption under Section 90 is available to prove Ex. P. 1. by the appellant, the trial Court totally disregarded to apply the presumption before recognising the right under the Will in respect of Items Nos. 1 to 3 of the suit schedule properties. Since the trial Court implicitly believed and relied on the genuineness of Ex.P.1, the first appellate Court insisted that it should have been proved under Section 68 of the Evidence Act.

21. When in a similar circumstances, a learned single Judge of Bombay High Court in Rangu Vithoba v. Rambha Dina : AIR1967 Bom382 after referring to Munnalal's ease, held :

'In a case based upon a Will, the pro-pounder or the plaintiff must plead that the document was properly executed and duly attested and was the last will of the testator. He cannot say that the defendants had not denied those facts. The question of presumption under S. 90 would arise only with respect to a case set up by the plaintiff and not with respect to a case which was never pleaded by the plaintiff. Where the plaintiff has not pleaded that the will was duly attested, there will be no question of presuming attestation under Section 90, Evidence Act. Assuming that the presumption under S. 90 could be made and the valid attestation of the Will could be upheld though not pleaded by the plaintiff, the presumption will not extend to the Will being the last Will of the testator. The mere

fact that it was a registered document would not contra-indicate its cancellation at a subsequent date of the making of another Will at a later date, particularly when the testator lived for more than thirty years after the Will.'

22. In am in respectful agreement with the decision of the Bombay High Court. The appellant has failed to prove the Will with well established principles of law. The observation in Sri Sidharood Swamy Math Trust Committee's case is made on the facts and circumstances of that case. Hence I answer the first substantial question of law in the affirmative.

23. With regard to the second question, the enthusiasm shown by the learned Counsel for the appellant and Sri Narasimhan, learned Counsel for Respondents is not so much encouraging. It is noticed in the Judgment of the learned Civil Judge that the necessary points for determination is not properly formed in accordance with Order 41, Rule 31 of the Code of Civil Procedure. However, the first Appellate Court gave its finding on all the issues formulated by the trial Court noting the arguments on those issues by para-wise. The approach of the Court below is merely an irregularity.

24. I cannot hold such an irregularity vitiated the whole Judgment of the first appellate Court. Hence the second question is answered in the negative.

In the result, this Appeal fails and the same is hereby dismissed.

No order as to costs.

25. Appeal dismissed.

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